STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 1999
v	No. 204445 Eaton Circuit Court
BOBBY REGINALD GREENLEE, Defendant-Appellant.	LC No. 97-000015 FC

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to ten to twenty years' imprisonment and ordered to pay $24,000 in restitution. He appeals as of right, and we affirm.

Defendant first argues that his right to silence was improperly infringed upon when a police officer testified that defendant only gave limited consent to search his residence. Although defendant failed to object to the testimony and the issue is not generally preserved for appeal, review is appropriate because a constitutional issue has been presented. *People v Gilbert*, 183 Mich App 741, 746-747; 455 NW2d 731 (1990).

Defendant argues that testimony that he limited the search only to obtain his leather jacket could have led the jury to believe that he was hiding the knife used in the assault somewhere else in the residence. We disagree that this testimony improperly implicated defendant's right to silence. The officer testified about statements made and conduct which occurred after defendant was given his *Miranda*[1] warnings and waived them by making statements to the police. Because the statements and conduct testified to occurred after the proper procedural requirements were met, defendant's constitutional right to remain silent was not involved. *People v McReavy*, 436 Mich 197, 203, 222; 462 NW2d 1 (1990); *People v Hunt*, 68 Mich App 145, 147; 242 NW2d 45 (1976). We also note that defendant was not prejudiced by the testimony, and in fact, he relied on it in his closing argument to persuade the jury that he must be innocent or he would not have cooperated with the police. He also

argued that he did not limit his consent and that the police could have searched for the knife if they had wished to do so.

Defendant next argues that the prosecutor made an improper civic duty argument in his closing when he stated that "this case reflects probably one of the sadder parts about our society and that is that violence is becoming more prevalent and it's done out in the public and there's total disregard for life and it often involves young people[2]." There was no objection to this remark and thus, our review is limited to a determination of whether a curative instruction could not have eliminated any prejudicial effect or whether a miscarriage of justice would result if we failed to consider the issue. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997), citing *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No manifest injustice will result because the remark, when considered in the context in which it was made, did not constitute an impermissible civic duty argument. It did not, and was not made to, appeal to the fears and prejudices of the jury and it did not inject issues broader than the guilt or innocence of defendant into the trial. *People v Bahoda*, 448 Mich 261, 282-285; 531 NW2d 659 (1995). Moreover, even if the remark was improper, any minimal prejudice that resulted from the remark could have been cured by an appropriate instruction.

Defendant next argues that evidence of his flight from the scene of the crime was improperly admitted. We disagree. There was no objection to the testimony about defendant's departure from the scene. Therefore, appellate review is precluded in the absence of a showing that the error could have been outcome determinative or that the error was so grave that prejudice is presumed. *People v Grant*, 445 Mich 535, 553; 526 NW2d 123 (1994). Defendant fails to make the requisite showing. Moreover, we note that in general, evidence of a defendant's flight is properly admissible as probative of his consciousness of guilt, although by itself, such evidence is insufficient to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Defendant next argues that the trial court should have sua sponte instructed the jury on the lesser included offenses of felonious assault, aggravated assault, and assault and battery. We disagree. This issue is not preserved for appellate review because defendant failed to request the lesser offense instructions and he expressed satisfaction with the trial court's instructions as given. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We therefore review only for manifest injustice. *Id.*

A trial court is not generally required to sua sponte instruct a jury on lesser offenses. *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982). A court is not even required to instruct on requested lesser offenses unless such offenses could be supported by a rational view of the evidence. *Id.* at 255, 262-263. In this case, the uncontroverted evidence presented at trial established that the victim was stabbed with a knife, and that, but for medical intervention, the wounds could have proved fatal. Defendant defended the charges by arguing that he was not the assailant. He did not contest the intent with which the assailant committed the stabbing. Thus, the lesser offense of felonious assault was inapplicable since the defining element of that offense is a lack of intent to commit murder or great bodily harm less than murder. MCL 750.82; MSA 28.277. Likewise, aggravated assault requires a showing that no weapon was used, MCL 750.81a; MSA 28. 276(1), and here there was uncontroverted evidence that the assault was made with a knife. Finally, given the severity of the assault, the

misdemeanor offense of simple assault and battery, MCL 750.81; MSA 28.276, could not be supported by a rational view of the evidence.

Defendant also argues that the trial court erred by ordering him to pay $24,000 in restitution without holding a hearing to establish the amount of the victim's loss or defendant's ability to pay. The trial court found the amount of the restitution was established by the presentence report and the victim's statements at sentencing. This was a proper manner in which to establish the amount of restitution. *People v Grant*, 455 Mich 221, 233-235; 565 NW2d 389 (1997). Where defendant failed to challenge the accuracy of the amount of the loss, the trial court was required to do nothing more. *Id.* In ruling on defendant's motion for new trial, the trial court noted that it had considered defendant's particular circumstances in arriving at the determination that defendant had the ability to pay restitution. By considering defendant's particular circumstances, the trial court complied with its obligations. *Id.* at 237-238.

Finally, defendant argues that his counsel's failure to raise appropriate objections at trial with regard to the issues now presented on appeal constituted ineffective assistance of counsel. In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *Stanaway, supra* at 687-688. Our review of the record and the individual issues raised by defendant on appeal has failed to disclose any errors requiring reversal or deficiencies in counsel's performance. Defendant has failed to demonstrate that his counsel's performance was substandard or that, but for his counsel's errors, there was a reasonable probability of acquittal. Therefore, we do not find that defendant was deprived of the effective assistance of counsel.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Harold Hood

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] The comment was made by the prosecutor in an attempt to illustrate that the violence at issue took place in public and there were numerous witnesses, including young girls, and thus, there were several versions of what took place:

> Now this case reflects probably one of the sadder parts about our society and that is that violence is becoming more prevalent and its done out in the public and there's total disregard for life and it often involves young people. And in this case because it was done out in the public and because there are several witnesses, being at Christmas time, we have several different versions of what took place or what was seen and that's common. I would submit to you that when people observe car accidents, depending on where they stand when their attention is drawn to it, and their ability to remember things over time, affects what they would be able to say to you or tell you in testifying.

In this case we had a lot of people testify and they saw only, many of them saw only portions of what took place. . . . We know that the two you girls in this case reported portions of what took place.